

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0203-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
IBAN ANTONIO MORALES,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064600

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Iban A. Morales

Douglas
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Iban Antonio Morales was convicted of aggravated robbery pursuant to a plea agreement in 2007. In accordance with the agreement, the trial court sentenced him to a presumptive term of 7.5 years' imprisonment. Morales filed a notice of post-conviction relief in October 2007. Pursuant to Rule 32.4(c)(2), Ariz. R. Crim. P., counsel filed a notice in lieu of a petition for relief, and the court extended the time for Morales to file a petition pro se. In July 2008, after having extended that deadline further and after Morales had failed to file a petition for relief, the court dismissed the post-conviction proceeding. Approximately a month later, Morales filed a motion to reinstate the proceeding and then filed a petition for post-conviction relief in April 2009. The court summarily dismissed the petition, treating it as a successive petition for post-conviction relief. This petition for review followed. We review the denial of relief under Rule 32 for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In his petition below, Morales contended his trial counsel had been ineffective in presenting evidence of mitigation and his Rule 32 counsel had been ineffective in failing to raise that issue in the first post-conviction proceeding. The trial court found Morales's claims procedurally precluded and that Morales had "failed to indicate or color his claim with any factual assertions as to what mitigation evidence was available or what impact this material might have had if it had been elicited." Morales raises the same claims of ineffective assistance of counsel on review and contends the trial court abused its discretion by dismissing them without holding an evidentiary hearing.

¶3 Rule 32.2(a)(3) precludes relief based on any claim that could have been raised in a previous post-conviction proceeding, except for claims enumerated in Rule 32.2(b). Ariz. R. Crim. P. 32.2. Morales could have asserted ineffective assistance of trial counsel in his first post-conviction proceeding, but he failed to do so. Because he neither asserted nor proved any exception to the rule of preclusion, the trial court did not abuse its discretion in finding this claim precluded.¹

¶4 Although a pleading defendant may raise a claim of ineffective assistance of Rule 32 counsel in a first successive petition for post-conviction relief, *see State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995), the defendant must present a colorable claim in order to merit an evidentiary hearing on the issue. “To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel’s representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel’s deficient performance.” *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). A colorable claim of post-conviction relief is “one that, if the allegations are true, might have

¹Morales also argues on review that the trial court erred “by failing to properly consider all mitigation [evidence] available” to it. Because Morales failed to present this claim below, however, we do not consider it on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(i) (defendant may raise on review only those issues “decided by the trial court”). But, to the extent he may have attempted to raise the issue in his petition below, it was also precluded by his failure to raise it in the previous Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a).

changed the outcome” of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); Ariz. R. Crim. P. 32.6(c), 32.8(a) (colorable claim presents material issue of fact or law). Here, as the trial court noted, Morales failed to identify any evidence of mitigation that had been available but was not presented at sentencing. Thus, he has shown neither deficient performance nor prejudice resulting from Rule 32 counsel’s failure to present that claim. The court did not abuse its discretion by summarily dismissing Morales’s claim of ineffective assistance of Rule 32 counsel.

¶5 Accordingly, although we grant Morales’s petition for review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge